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SUPREME COURT OF THE
UNITED STATES

October Term, 1977

BRUCE W. WADSWORTH, AD-
MINISTRATOR, ETC.

V.

FRANCIS E. WHALAND

No. 77-765

JAMES M. DAWSON, AD-
MINISTRATOR, ETC.

V.

FRANCIS E. WHALAND

No. 77-772

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The State of New Hampshire

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STATEMENT OF THE CASE

Petitioners in this case are the Administrators of six employee health and welfare funds, five of which are "Taft-Hartley Trusts" established under 29 U.S.C. §186 as amended, (Supp. 1975) through which employers are permitted to contribute to group insurance plans for employees under that statute. The Respondent, the New Hampshire Insurance Commissioner, is responsible for implementation of the state's new mental health law, Chapter 57 of the Laws of 1976 of the State of New Hampshire [codified in RSA 415:18-a, 419:5-a and 420:5-a (hereinafter "Chapter 57")]. Chapter 57 provides for coverage of mental and nervous conditions in certain group health and accident insurance policies.

Petitioners brought suit in the

United States District Court for the District of New Hampshire seeking temporary and permanent injunctive relief and requesting a declaratory judgment under 28 U.S.C. §2201 (1970) that Chapter 57 is unconstitutional, and preempted by both Section 514 of the Employee Retirement Income Security Act (hereinafter "ERISA"), 29 U.S.C. §1144 (Supp. 1975) and Section 302 of the National Labor Relations Act, 29 U.S.C. §186 (Supp. 1975). They asserted jurisdiction under 28 U.S.C. §§1331 and 1343(3) (1970).

On December 22 and 23, 1976, the District Court heard evidence on Petitioners' motion for preliminary injunctive relief. Subsequently, cross-motions for summary judgment were filed together with supporting affi-

davits. On February 11, 1976, the District Court handed down its decision ordering that judgment be entered for Respondent based on its finding that the state law under attack was neither unconstitutional nor preempted by ERISA. Petitioners appealed the District Court's decision to the United States Court of Appeals for the First Circuit, and in so doing, shifted their emphasis from the constitutional claims to the preemption issue. On September 1, 1977, the First Circuit handed down its decision affirming the ruling of the District Court. Petitioners have filed timely Petitions for Writ of Certiorari.

ARGUMENT

The doctrine of federal preemption established by the line of cases dating back to the watershed decision of this Court in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), is embodied in a two-part test. Preemption lies where state law is in clear conflict with applicable federal laws or where there is clearly discernible in a particular federal statute the intent on the part of Congress to preempt an entire field for exclusive regulation by the federal government. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141, 146 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

This bifurcated test is tempered

by an overlay based on the fundamental principles of federalism. While always acknowledging the federal government's overreaching authority under the Supremacy Clause, this Court has been solicitous of interests peculiarly local in nature and chary not to prevent states from acting within the limits of their sovereign powers in the absence of an explicit mandate from Congress. Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960); United States v. Underwriters Assn., 322 U.S. 533, 548-49 (1943); Patapsco Guano Co. v. North Carolina, 171 U.S. 345 (1898).

A. CHAPTER 57 IS NOT PREEMPTED BY ERISA: THERE IS NO CLEAR CONGRESSIONAL INTENT TO PREEMPT STATE INSURANCE LAWS INDIRECTLY AFFECTING EMPLOYEE BENEFIT PLANS, NOR IS THERE ANY CONFLICT BETWEEN THE TWO STATUTES

Nowhere has this Court's deference been greater than in the area of insurance law. As this Court stated in SEC v. Variable A. L. Ins. Co., 359 U.S. 65, 68, 69 (1959), "when the States speak in the field of 'insurance,' they speak with the authority of a long tradition. For the regulation of 'insurance,' though within the ambit of federal power, has traditionally been under the control of the States." See also Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1954); Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co., 284 U.S. 151, 157, 158 (1931).

The court-established deference to the states in the field of insurance was perpetuated by Congress in the McCarran-Ferguson Act, 15 U.S.C. §1011, et seq. (1970). That Act states:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.... 15 U.S.C.A. §1012. (Emphasis supplied.)

This Court has stated with some exactitude just what is meant by the "business of insurance" as Congress used that phrase in the Act:

> The relationship between insurers and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement [to be]

> the core of the "business of insurance." SEC v. National Securities, Inc., 393 U.S. 453, 460 (1968) (emphasis supplied).

The key to the preemption issue lies, of course, in the three subsections in Section 514 of ERISA which have been cited by Petitioners. Section 514(a) of ERISA, 29 U.S.C. §1144(a) provides, in pertinent part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan....

Section 514(b)(2)(A) of ERISA, 29 U.S.C. §1144(b)(2)(A), states:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

Section 514(b)(2)(B) of ERISA, 29 U.S.C. §1144(b)(2)(B), provides, in pertinent part, that an employee benefit plan shall not

> ...be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

Petitioners consider these provisions in conjunction with Section 514(c)(2) of ERISA, 29 U.S.C. §1144(c)(2) which provides:

> The term "state" includes a state, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

It is Petitioners' contention that the purpose of the three subsections is as follows: under subsection (a) Congress vested the federal government with the exclusive power to regulate, directly or indirectly, employee benefit plans (in short, Petitioners claim that subsection (a) is a statement that Congress intended the federal government to occupy the entire field of employee benefit plan regulation); under subsection A Congress preserved the states' traditional supervisory authority over the insurance industry; finally under subsection B Congress sought to preclude state regulation of employee benefit plans by deeming such plans to be insurers for purposes of state insurance laws.

Petitioners claim that state in-

surance laws such as Chapter 57 which indirectly affect employee benefit plans to the extent that they apply directly to insurers with whom such plans do business, are preempted by Section 514 of ERISA. Petitioners attempt to circumvent the McCarran-Ferguson Act by arguing that ERISA specifically "relates to the business of insurance" under that Act and therefore may supersede state insurance law.

Respondent, on the other hand, submits that ERISA does not specifically relate to the "business of insurance" within the meaning of McCarran-Ferguson. ERISA, rather, relates to the management, funding and control of employee benefit plans. The enactment of ERISA was set against a backdrop of mismanagement and abdication of fiduciary ob-

ligations; its object was to eliminate such abuses. See generally Hutchinson, The Federal Prudent Man Rule Under ERISA, 22 Vill. L. Rev. 15, 21 (1976). Like the Securities Act of 1933, 15 U.S.C. §17-a, et seq. (1970), ERISA is primarily a disclosure law and does not relate at all to the actual substantive benefits offer in employee benefit plans. Nowhere in ERISA is there any statement that the statute was intended to relate to the business of insurance or that it does in fact relate to that business. Nowhere is there any direct conflict between Chapter 57, which regulates the substantive content of insurance policies, and any of the provisions of ERISA. In view of the deference traditionally accorded the states by the judiciary on matters involving insurance, and in the

absence of an explicit statement that ERISA preempts state insurance laws which indirectly affect employee benefit plans, preemption should not be found to lie. See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974); New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973).

Petitioners hold up the decisions in Marshall v. Chase Manhattan Bank, 558 F.2d 680 (2d Cir. 1976) and in Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Cal. 1977) as examples of decisions in other jurisdictions that conflict with those entered by the courts below. But there is no similarity between either of those decisions and the case at bar. In

Marshall a bank which was the trustee of an employee pension benefit plan of a bankrupt corporation sought an accounting and sought to wind down the plan in state court. The Second Circuit found that the federal courts had exclusive jurisdiction over such actions under 29 U.S.C. §1132(e)(1).

In Hewlett-Packard the District Court for the Northern District of California was confronted with the question whether the California Knox-Keene Health Care Service Plan Act of 1975, Cal. Health & Safety Code §1340, et seq. (hereinafter the "Knox-Keene Act") was superseded under Section 514 of ERISA. The Knox-Keene Act, like ERISA, was by its own terms applicable to "health care service plans," (Cal. Health & Safety Code §1345(f); see

also Hewlett-Packard, supra, at 1295-96). Like ERISA, the California Act was primarily a disclosure law; its requirements were in direct conflict with those of the federal law. So long as both statutory schemes were in effect, employee benefit plans in California were subjected to two complex and duplicatory reporting requirements. The California Court held that Section 514(a) of ERISA preempts "a state statute such as Knox-Keene insofar as it seeks to regulate ERISA-covered employee benefit plans," Hewlett-Packard, supra, at 1297.

There is no conflict between these, or any other decisions cited by Petitioners, and the First Circuit's decision in this case that a state law which relates to the content of group

insurance policies, which imposes substantive requirements directly only upon insurance companies, and which does not purport to and does not in fact impose direct regulation on employee benefit plans is not preempted by ERISA.

B. CHAPTER 57 IS NOT PREEMPTED BY GENERAL PROVISIONS OF FEDERAL LABOR LAW: THE PREEMPTION DOCTRINE OF LABOR LAW IS INAPPLICABLE

Petitioner Wadsworth asserts that if Chapter 57 is not preempted by ERISA then it is preempted under the general principles of preemption applicable in the context of federal labor law. But the doctrine of preemption as developed in labor law has no application here. The doctrine is a narrow one; it pertains to the jurisdiction of the National Labor Relations Board in cases involving conduct in the course of labor disputes which, in turn, relates to the fundamental objective of Congress of promoting collective bargaining. See Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1338 (1972).

The preemption doctrine in labor

law is bottomed on the principle that the NLRB has preemptive authority to determine whether conduct is protected under Section 7 of the National Labor Relation Act, 29 U.S.C. §157 (1970), proscribed as an unfair labor practice under Section 8 of the Act, 29 U.S.C. §158 (1970), or whether it falls between the two sections. See Lesnick, Pre-emption Reconsidered: The Apparent Reaffirmation of Garmon, 72 Colum. L. Rev. 469, 472 (1972).

This Court has long recognized that the primary responsibility for interpreting and applying the principles of federal labor law lies within the preemptive authority of the NLRB and that the consistent construction of the federal labor law is of paramount importance. See Garner v. Teamsters

Local 776, 346 U.S. 485, 490-91 (1953). See also Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957); cf., Youngdahl v. Rainfair, 355 U.S. 131 (1957); Teamsters Union v. New York, N.H. & H.R. Co., 350 U.S. 155 (1956); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).

But federal labor law clearly does not preclude all state laws which affect, directly or indirectly, the management-labor relationship. Preemption will not occur where state action involves matters of "peripheral concern" to federal law, San Diego Unions v. Garmon, 359 U.S. 243 (1959). As Professor Cox noted,

> ...Congress developed this special framework for self-organization and collective bargaining within a larger context of state law cre-

> ating rights of property, bodily security, and personality, preserving public order, and promoting public health and welfare. These laws apply to the general public or substantial segments thereof without regard to whether the individual is an employer, union, or employee concerned with unionization or a labor dispute.... The likelihood that the collateral impact of such laws upon management or labor will upset the national balance is small enough to permit their operation unless interference with a specific federal right can be affirmatively demonstrated. Cox, Labor Law Preemption Revisited, supra, at 1355-56 (emphasis supplied).

Respondent respectfully submits that a state insurance law, particularly one which pertains to the health and welfare of the state citizenry is not preempted by federal labor law.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari filed by Petitioners in this case be denied.

Respectfully submitted,

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